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Thank you Mr. Chairman, Mr. Ranking Member, and members of the subcommittee for inviting me to testify on the important subject of voting rights for residents of the District of Columbia.

The purpose of this hearing is to explore H.R. 5388 the "District of Columbia Fair and Equal House Voting Rights Act of 2006" which creates a House seat for the District of Columbia.

H.R. 5388 would increase the size of the House to 437 members. It treats the District of Columbia as a district that will be represented in the House. It also calls for a second new district to be located in Utah, as Utah narrowly missed out on a seat in the last re-apportionment. That Utah district would be an at-large district, and the three current Utah districts would remain intact. After the next reapportionment, the District of Columbia would still be considered a district with a representative, and the remaining 436 seats would be apportioned among the states based on the current method of apportionment.

I wrote my weekly column in *the Hill* on this bill last spring, which I described somewhat facetiously as "much-needed, ingenious, and blatantly unconstitutional."[1] I say *somewhat* facetiously because even though the sentence had a provocative tone, I believe all three of these descriptions of H.R. 5388 are true. First, a proposal to grant the citizens of the District the right to vote for congressional representatives is much needed. It is an injustice that for over two hundred years District residents have not had congressional representation. Second, H.R. 5388 is ingenious in the way it balances the partisan concerns of Republicans and Democrats that arise over such an issue. Third, as much as I agree with the aim of the legislation and admire the political savvy of its authors, H.R. 5388 is not the answer to the District's problems. The central premise that Congress can by simple legislation create a representative for the District is wrong. The Constitution, not Congress, has determined that the House and Senate will be made up of representatives of states and states alone. Congress can no more change the Constitution on this matter by simple legislation than it could repeal the first amendment or allow sixteen year olds to serve as president.`

The unfortunate conclusion of my remarks is that because H.R. 5388 is not constitutional, the road to representation for DC residents is difficult. There are three legitimate ways to accomplish this end: (1) to admit the District as a state into the United States; (2) to "retrocede" the District to Maryland; (3) to amend the constitution to allow DC to retain its current status but also grant it representation in Congress. All are legitimate means to a just end, but all would face significant political opposition.

[1] John C. Fortier, "DC Colony," *The Hill*, May 17, 2006.

It is an injustice that DC residents are not represented in the House and Senate

The District of Columbia has over 500,000 residents. Only in the past forty years have they been entitled to vote in presidential elections. They have no full voting representatives in either the House or the Senate.

While residents of U.S. territories also have no voting representation in Congress, the case of the District is even more compelling. The seat of government has been here since 1800, but DC has all the while been unrepresented in Congress and has watched as many territories have become states and now enjoy representation in Congress. The District is integrally connected to the U.S., not separated by ocean or language from the fifty states.

One should not quarrel with the message on the District's license plate, "taxation without representation." The message is essentially correct.

The Ingenuity and Political Savvy of the Davis/Norton proposal (H.R. 5388)

The Davis/Norton proposal tries to address the partisan political concerns of Democrats and Republicans over the issue of DC representation. In all likelihood, the District would elect a Democratic representative. To balance this, the proposal adds an additional representative to Utah, which barely missed out on a fourth representative last re-apportionment. At least until the next apportionment, one of the two new seats created

would likely be represented by a Republican and one by a Democrat. The bill also provides that the new Utah representative would be elected at-large and that the existing districts in Utah will remain the same until the next apportionment and redistricting. This was again done to delicately balance political concerns, as Utah Democrats worried that a new redistricting might adversely affect the district lines of Utah's sole Democratic Representative.

While this arrangement is unusual, I see no constitutional objection to it. Congress may increase the size of the House to 437 by simple legislation. The at-large district is temporary. And it is well within Congress's power to regulate the time, place and manner of elections and therefore to prescribe such an at large district. Congress has previously weighed in legislatively to require that states employ single member districts, but it is within Congress's power to alter that judgment overall by allowing or even requiring at large districts. It may also carve out a specific exception to its general rule requiring states to create single member districts as H.R. 5388 proposes to do.

Overall, the provisions of H.R. 5388 that increase the size of the House and the creation of an at-large district are well thought out and constitutionally unobjectionable.

Why H.R. 5388 is unconstitutional

The Constitution clearly indicates that Congress shall be composed of representatives from states and states alone. Congress itself does not determine the makeup of Congress,

it is the Constitution that makes that determination. Of course, Congress would play an important role in the admission of states, in the retrocession of the District to the state of Maryland, and in the constitutional amendment process. But through the normal legislative process, Congress cannot get around the Constitution's clear language that both the House and the Senate are composed of representatives from states and states alone.

The textual evidence in the Constitution that the people of states are to be represented in the House and Senate is extensive:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several **states**, and the electors in each **state** shall have the qualifications requisite for electors of the most numerous branch of the **state** legislature."
>
> "No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that **state** in which he shall be chosen."
>
> "each **state** shall have at least one Representative"
>
> "When vacancies happen in the Representation from any **state**, the executive authority thereof shall issue writs of election to fill such vacancies." [Article I, Sec.2, (my emphasis)]

There are many similar references to states in Article I, section 3 of the original Constitution which describes how state legislatures were to choose senators. The seventeenth amendment which was ratified in the early twentieth century and which provided for a popular vote for senators also indicates that it is the people in the states who are to be represented in the Senate:

> "The Senate of the United States shall be composed of two Senators from each **state**, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each **state** shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."
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> "When vacancies happen in the representation of any **state** in the Senate, the executive authority of such **state** shall issue writs of election to fill such vacancies: Provided, that the legislature of any **state** may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." [Amendment XVII (my emphasis)]

The Constitution also provides that states will have the power to regulate elections, although Congress may alter those regulations:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each **state** by the legislature thereof." [Article I, section 4 (my emphasis)]

Finally, the Constitution prescribes an instance when the votes in Congress will be counted by state delegation rather than by individual members. If no presidential candidate receives a majority of the votes of the presidential electors, the House is called upon to choose the president from among the top three candidates. Under these circumstances, a quorum shall be representatives from two thirds of the states, not of the members themselves. And the vote to select a president shall require a majority of state delegations:

> "if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by **states**, the representation from each **state** having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the **states**, and a majority of all the **states** shall be necessary to a choice." [Amendment XII (my emphasis)]

The textual evidence that Members of the House and Senators shall be representatives of people in states is overwhelming. It is not described by a throwaway or ambiguous line in the Constitution, but pervades the whole text. The framers of the original Constitution and of later amendments were crystal clear that representation in Congress was for people in states. They knew of the case of territories (The Northwest Territory was in existence prior to the ratification of the Constitution) and made provisions for Congress to administer them. They included constitutional provisions for the creation and governance of a district for the seat of government, but they never provided for representation in Congress for territories or the seat of government.

Selected History of Attempts to Give Representation to the District

Numerous efforts have been made to give representation to the District of Columbia. In two prominent cases, proponents of these efforts sought to amend the constitution, but did not pursue a simple legislative strategy that is urged by H.R. 5388.

The enactment of the 23rd amendment gave District residents the right to participate in presidential election. Using the logic that is behind H.R. 5388, Congress could have achieved the same result by legislation, using the Seat of Government Clause as a justification for passing a simple piece of legislation to grant DC residents the vote in presidential elections. If such an option were legitimate, why would the proponents of the 23rd amendment have spent the significant time and energy needed to secure 2/3 votes

in both houses of Congress and spent nearly a year seeking ratification in three quarters of the states?

Similarly, a major effort to grant DC residents the right to vote in congressional elections was proposed in the form of a constitutional amendment that passed both houses of Congress in 1978. Proponents of this measure then pursued the matter in state legislatures but failed to secure ratification in three quarters of the states. After seven years had elapsed, as the amendment prescribed, the ratification failed. Again, why would the proponents of representation for DC have used such a long, arduous, and ultimately unsuccessful process if the whole matter could be resolved by simple legislation?

In addition to these two efforts to amend the Constitution to give representation to the District, consider also the attempt in the 103rd Congress to give delegates from the District and territories the right to vote in committee and in the committee of the whole. The House changed its rules to this effect. Why would the proponents of representation for DC and the territories have sought only these changes? Why would they have not proposed full voting privileges for delegates, making them essentially equal in status to representatives from states?

The answer is given in part by *Michel v. Anderson.*[2] When some members of Congress sued claiming these rules changes went too far, the DC Circuit Court affirmed the change in rules, but noted that it passed constitutional muster because it did not give the essential qualities of representatives to delegates. In a nutshell, it was acceptable to allow delegates to participate in all the deliberations and secondary votes in committees including the committee of the whole as long as their votes would not be decisive on votes on the final passage of bills.

In short, proponents of representation for DC have worked long and hard to pass constitutional amendments or have settled for less than full privileges for delegates because they did not believe that a simple legislative solution was legitimate.

The Seat of Government Clause

The proponents of granting the District representation by simple legislation rest much of their case on the clause in Article I that grants Congress the power to control the affairs of the District.

> "Congress shall have the power…to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." [Article I, sec. 8]

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[2] 41 F.3d 623 No. 93-5109

Clearly, the power granted to Congress over the District is broad in scope. But this power is best understood as the power to govern the affairs of the District as a state government would govern over its territory. Congress has even somewhat greater power over the District than a state government has over its territory, as it is not subject to some of the restrictions the Constitution places on states. For example, Congress could coin money for the District, if it deemed that course of action wise, as the Constitution prevents states from coining money, but does not impose a similar restriction on the governance of the District.

But what cannot be done under the Seat of Government clause is to grant the District powers that override other constitutional language. The Seat of Government Clause cannot be an excuse to use simple legislation to amend the constitution through the back door.

This is, however, what proponents of the Davis/Norton approach propose to do. They describe the Seat of Government Clause as "majestic in scope."[3] It is described in such grandiose terms that Congress might use the Seat of Government Clause for any end as long as it relates o the welfare of the District's residents.

[3] Testimony of the Hon. Kenneth W. Starr before the House Government Reform Committee, 2154 Rayburn House Office Building, Washington, D.C., June 23, 2004, p. 4. See also Viet Dinh and Adam Charnes, "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives." November 2004 found at http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf

If this power is as broad as proponents suggest, then Congress could have granted District residents the right to participate in the election of a president by simple legislation rather than through the 23rd amendment. Under this broad interpretation Congress could give the District representation in the Senate.

Again under this interpretation of the Seat of Government Clause, there is no reason why Congress would be limited to providing representation to the District that is proportional to its population. While states would be subject to apportionment for their representatives, Congress could give the District two representatives, or ten, or four hundred thirty six. In fact, the H.R. 5388 deviates from proportionality by mandating that the District will never have more than one representative in the House no matter how large its population grows.

Similarly, there is no reason why such a broad power would be limited by constitutional provisions that give two senators to each state; Congress might grant the District as many senators as it saw fit. Congress might eliminate age or citizenship requirements for District representatives.

Under such a broad interpretation almost every constitutional provision would fall if Congress were to act in its capacity to govern the affairs of the District.

In addition to the constitutional problems arising under such a broad interpretation of the Seat of Government Clause, consider a practical one. Since Congress has created the

District of Columbia's seat in the House, it could take it away by legislation. Suppose the majority party wanted to punish the District or the particular representative of the District, Congress could pass a law abolishing the office. Congress does not have the power to take away all representation from any state, as the Cnstitution guarantees each state at least one representative. But the District's seat would rest on the whim of the legislature.

Treating the District as a State

The fallback position for those advocating the use of the Seat of Government Clause as a basis for giving representation to the District is that Congress has the power to treat District as a state, as it has done in certain pieces of legislation and as courts have held in certain instances, and therefore it may convey upon the District all of the attributes of statehood, including right to be represented in Congress.

But if the Seat of Government clause is broad enough to allow Congress to ignore the many clear textual references that only the people in states are represented in Congress then why would this clause be limited to treating the District as a state and then abiding by other constitutional language?

It is true that in certain contexts Congress and the Courts have treated the District as a state. But variety of circumstances in these cases does not point to a general rule that Congress may treat the District of Columbia as a state. The central case of *National Mutual Insurance Company of the District of Columbia v. Tidewater Transfer Company*[4] illustrates the divisions on this issue rather than the ensus. The case was decided 5-4 and the opinion upheld a law that allowed District residents access to federal courts in diversity suits. However, only two justices held the view that the District should be

[4] 337 U.S. 582 (1949).

treated as a state. Three justices in the majority upheld the law, but explicitly refused to consider the District as a state. They instead relied on the Seat of Government Clause, but did not argue that the clause treated the District as a state.

Territorial Jurisdiction

As the Seat of Government Clause pertains to Congress's power over the District of Columbia, so the Territorial Clause pertains to Congress's similar powers over territories:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." [Article IV, sec. 3]

The language of the Territorial Clause is different than that of the Seat of Government Clause, but it is no less "majestic" in its scope. The logical way to interpret this clause is to read it as Congress having the power to govern the territory as a state government governs its own territory. Even though the language is not identical, in practical effect, Congress under the Territorial Clause should have the same role in governing the territories as it does in governing the District under the Seat of Government Clause.

But if the Seat of Government Cause is to be read so broadly as to allow Congress to provide representation for the District in Congress, then surely Congress could provide the same representation for the territories under a similarly broad reading of the Territories Cause. This power would not only apply to organized territories or territories that currently have delegates in Congress, but would apply to all territories. And the

territories vary widely in population. Puerto Rico has nearly 4 million people and would qualify for five or six representatives in the House if it were a state, but most of the territories are significantly smaller. The population of the Northern Mariana Islands, for example, is approximately 80,000. Wake Island is inhabited by approximately 200 civilian contractors. Does Congress have the power to grant these territories representation in Congress by a simple act of legislation under the guise of governing the territories?

Conclusion

The residents of the District of Columbia deserve congressional representation. Unfortunately, the legitimate means for granting that representation are very difficult to pursue. There does not seem to be strong political sentiment in favor of statehood for the District, retrocession of the District to Maryland or a constitutional amendment granting DC congressional representation. Nevertheless, they are the only legitimate alternatives to get congressional representation for District residents.

The "District of Columbia Fair and Equal House Voting Rights Act of 2006" has its heart in the right place, but it will not pass constitutional muster. It too easily glosses over the numerous textual references in the Constitution that grant representation only to the people of states. And it builds on a foundation of a much too expansive view of the Seat

of Government Clause which might have many adverse consequences if applied in different contexts.